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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Butte)

THE PEOPLE,

Plaintiff and Respondent,

v.

JAMES THOMAS MABBS,

Defendant and Appellant.

C061556

(Super. Ct. No. CM028752)

A jury convicted defendant of assault with a semiautomatic firearm and found that he personally used a firearm and acted to benefit a criminal street gang. (Pen. Code, §§ 245, subd. (b), 12022.5, subd. (a), 186.22, subd. (b)(1).)¹ The trial court sentenced defendant to prison for 29 years, and defendant timely filed this appeal.

On appeal, defendant contends the trial court committed two sentencing errors. First, he contends that the trial court

¹ Hereafter, undesignated statutory references are to the Penal Code.

erroneously imposed a 10-year gang enhancement, because that enhancement was based in part on the firearm enhancement. Based on a California Supreme Court case decided after the sentencing hearing in this case, *People v. Rodriguez* (2009) 47 Cal.4th 501 (*Rodriguez*), the Attorney General concedes that the trial court erred. We shall accept that concession. However, because it is clear the trial court wanted to impose the maximum possible lawful term, we will modify the sentence on the gang enhancement to four years, the maximum legally authorized sentence, instead of remanding for a futile sentencing hearing. Second, defendant contends the trial court improperly relied on facts not found true by the jury in selecting the upper term of 10 years for the firearm enhancement, in violation of his Sixth Amendment rights as interpreted by *Cunningham v. California* (2007) 549 U.S. 270 [166 L.Ed.2d 856] (*Cunningham*). However, because defendant's prior convictions authorized the upper term, we conclude no *Cunningham* violation occurred.

We shall modify the sentence and otherwise affirm.

FACTS

In June 2006, late at night, defendant and another man burst into Michael N.'s house in Oroville and fired several gunshots. Michael N. was hit in the leg, and defendant shot himself in the leg when he put his gun back in his pants. Semiautomatic pistol shell casings of two different calibers were found at the scene. Evidence showed the shooting was for the benefit of the Norteño street gang, of which defendant is an

admitted member. Michael N. was targeted for retaliation because of an earlier altercation he had with Norteño gang members on the day of the shooting in this case.

Michael N. saw only one shooter, the one who then shot himself in the leg, leaving a bloody trail. Michael N.'s girlfriend told an officer she saw two shooters, one who stayed by the door, and one who advanced on and shot Michael N. She later saw the wounded shooter at the hospital.

SENTENCING HEARING

Defendant's mitigation statement argued for the lower or middle terms on "the underlying charge and the use enhancement, because factors in aggravation do not outweigh those in mitigation." Defendant also argued the same facts could not be used to impose the upper term for assault and the gun enhancement. However, he conceded the 10-year gang enhancement would be added to the total of the term for the underlying charge and the gun enhancement. The trial court imposed the upper term of 9 years for the underlying charge, the upper term of 10 years for the gun enhancement, and 10 years for the gang enhancement.

The trial court rejected the defense claim for lenity, stating in part, "to consider imposing a low term on this gentleman with his background, smacks of a ludicrousness in this Court's mind, and to do anything but an upper term, regardless of whether he sees fair, because fair is a word that's relative, considering Mr. Mabbs' background and what he has done." This

passage may have been partly garbled when transcribed, but it shows the trial court believed defendant deserved the greatest possible punishment, given his criminal background and the heinous nature of the current offense.

The trial court later stated that defendant "is literally and figuratively a post card or picture of gang activity in Butte County. He has something like 12 gang-related tattoos." "And it is his apparent world view that people of identical genetic background, of identical rearing . . . living in an identical community, one half of them are evil and need to be killed and the other half are good and need to be protected, okay? That is aberrant thinking in this Court's mind and makes him an extreme danger for our society."

The trial court gave the following reasons for imposing the upper term for the assault charge:

"Facts relating to the crime indicate that the crime involved great violence, great bodily harm, and disclosed a high degree of cruelty, viciousness and callousness. The defendant entered the home, kicking the door open. Not entering it as if a drug sale was going on.^[2] There was evidence of a splintered door frame presented to the jury.

"The victim was particularly vulnerable. He was in his own home where he has a right to feel secure. And there's no

² Defendant had filed posttrial documents, in part claiming the shooting was connected to a drug deal.

question the victim in this matter was not an innocent babe in the woods, he was someone who was probably also involved in gang activity. That's just a guess on the part of the Court. There was no evidence of that at the trial.^[3] He certainly had some other things going. He had been involved in a fight earlier in that day with gang members.

"The Court is making a finding that the manner in which the crime was carried out indicates some degree of planning, sophistication, or professionalism. There was a get-away car parked down the street, the white car later used to take the defendant to the hospital.

"The Court finds that multiple shots were fired at the victim in the victim's home, hitting him on one occasion,

"The defendant has other convictions involving firearms and weapons as a juvenile and now as an adult.

"The facts relating to the defendant include the fact that he engaged in violent conduct, indicating a serious danger to society.

"His prior convictions as an adult or sustained petitions as a juvenile are numerous and increasingly serious and his prior performance on probation and parole were unsatisfactory as a juvenile. In that matter he ultimately was sent to CYA for 55 months and was discharged dishonorably when he reached the age

³ The prosecution's gang expert testified he had not checked, but knew of no gang ties involving the victim.

where he could no longer be held in CYA. So that's a failure of probation or parole in the Court's mind.

"[The] Court can identify no circumstances in mitigation in this matter. [¶] . . . [¶]

"[The] Court is also going to impose the ten-year upper term on the use of firearm, making the following findings in addition to those used with regard to 245(b). The defendant shot the firearm a number of times. The exact number is unclear. More than five times. And in the home, I will note for the record, the one area of concern that the Court has always had in this case is [that] two different types of shell casing were found in the home. And that was not dealt with satisfactorily to the Court, at least in the trial. The--but however, not only did he shoot those shots, but he shot them at the victim and near the victim's girlfriend and ultimately hit the victim.

"Therefore, the Court believes that the ten-year upper term is appropriate.

"The Court must impose the ten years on the [gang enhancement], and therefore . . . will do so."

DISCUSSION

I.

Gang Enhancement Sentence

The gang enhancement statute, section 186.22, subdivision (b)(1), provides in part as follows:

"Except as provided in paragraphs (4) and (5), any person who is convicted of a felony committed for the benefit of . . . any criminal street gang . . . shall, upon conviction of that felony, in addition and consecutive to the punishment prescribed for the felony or attempted felony of which he or she has been convicted, be punished as follows:

"(A) Except as provided in subparagraphs (B) and (C), the person shall be punished by an additional term of two, three, or four years at the court's discretion.

"(B) If the felony is a serious felony, as defined in subdivision (c) of Section 1192.7, the person shall be punished by an additional term of five years.

"(C) If the felony is a violent felony, as defined in subdivision (c) of Section 667.5, the person shall be punished by an additional term of 10 years."

Because the jury found that defendant personally used a gun, the assault charge was a "violent" felony within the meaning of section 667.5, subdivision (c)(8). Therefore, under section 186.22, subdivision (b)(1)(C), as the trial court found, the additional punishment would be a fixed term of 10 years.

However, section 1170.1, subdivision (f) provides: "When two or more enhancements may be imposed for being armed with or using a dangerous or deadly weapon or a firearm in the commission of a single offense, only the greatest of those enhancements shall be imposed for that offense. This subdivision shall not limit the imposition of any other

enhancements applicable to that offense, including an enhancement for the infliction of great bodily injury."

After the sentencing hearing in this case, the California Supreme Court held that where a defendant is subject to a firearm enhancement and a gang enhancement based on the use of a firearm, section 1170.1, subdivision (f) precludes imposition of both enhancements. (*Rodriguez, supra*, 47 Cal.4th at pp. 508-509.) Based on this new decision, defendant contends, and the Attorney General concedes, that the existing sentence is infirm. The parties also agree that by removing the firearm element, the punishment for the gang enhancement would be "an additional term of two, three, or four years at the court's discretion." (§ 186.22, subd. (b)(1)(A).)

We agree with the parties that based on the application of section 1170.1, subdivision (f), as interpreted by the California Supreme Court, the sentence on the gang enhancement should have been two, three or four years.

Defendant contends that we must remand the matter for a new sentencing hearing, in part because the California Supreme Court remanded for a new hearing in *Rodriguez*.

We see no reason to remand in this case. We quoted the trial court's extensive sentencing comments earlier in this opinion. The trial court viewed the crime as especially heinous, given that defendant and a companion kicked in the victim's door at night, entered the home, and began shooting. Based on that circumstance, as well as defendant's criminal

history and the lack of any mitigating factors, it is not reasonably probable that the trial court, on remand, would impose anything less than the maximum legally authorized sentence. (See *People v. Osband* (1996) 13 Cal.4th 622, 728-729; *People v. Davis* (1995) 10 Cal.4th 463, 552.)

No purpose would be served by remanding for a sentencing hearing where the result is foreordained, instead of exercising our power to modify the sentence. (§ 1260; see *People v. Alford* (2010) 180 Cal.App.4th 1463, 1473.) Accordingly, we modify the sentence on the gang enhancement to four years.

II.

Cunningham

Defendant contends the trial court improperly imposed the upper term on the firearm enhancement, because the fact used to impose the upper term, that defendant fired multiple shots, was not found true by the jury. He posits that this violated his Sixth Amendment rights. We disagree.

The Determinate Sentencing Law (DSL) presumed the midterm of a sentencing triad would be imposed, but the United States Supreme Court concluded the Sixth Amendment forbade imposition of the upper term based on facts—other than prior convictions—that were not either admitted by the defendant or found true by the jury. (*Cunningham, supra*, 549 U.S. 270 [166 L.Ed.2d 856]; see *People v. Lincoln* (2007) 157 Cal.App.4th 196, 201-202 (*Lincoln*).)

The Legislature fixed the *Cunningham* problem by eliminating the presumptive midterm for substantive offenses, but it did not initially eliminate the presumptive midterm for enhancements punishable by three possible terms. (See *Lincoln*, *supra*, 157 Cal.App.4th at pp. 204-206.) At the time of sentencing, section 1170.1, subdivision (d) provided, in part, that where an enhancement is punishable by three terms, the court "shall impose the middle term unless there are circumstances in aggravation or mitigation," and states its reasons on the record. (Stats. 2002, ch. 126, § 1.)⁴

Defendant contends this statute has the same Sixth Amendment problem that was identified in *Cunningham*, and that the trial court violated his Sixth Amendment rights by imposing the upper term on the enhancement based on the trial court's conclusion that defendant fired multiple shots. He also contends that if we find a forfeiture of this claim, his trial attorney was incompetent in not interposing a *Cunningham* objection at sentencing. Because we reject the *Cunningham* claim on the merits, we need not address defendant's alternate claim of incompetence of counsel.

⁴ Section 1170.1 subdivision (d) was later amended to eliminate the presumptive midterm for enhancements. (Stats. 2009, ch. 171, § 5.) We need not address defendant's claim that applying this statute to his case would transgress ex post facto principles. (But see *People v. Sandoval* (2007) 41 Cal.4th 825, 854-855.)

After a lengthy juvenile commitment and three adult misdemeanors, defendant was sentenced to prison for seven years for a felony weapons violation committed to benefit a criminal street gang, and he was on parole from that sentence when he committed the instant offense.

Regardless of the reasons given by the trial court, defendant's recidivism made him *eligible* for the upper term, because the *Cunningham* rule does not preclude imposition of an upper term based on recidivism factors, whether or not those factors have been admitted by the defendant or found true by the jury. (See *People v. Black* (2007) 41 Cal.4th 799, 816; *People v. Wilson* (2008) 164 Cal.App.4th 988, 992; *People v. Velasquez* (2007) 152 Cal.App.4th 1503, 1514-1517.)

Defendant objects that the trial court did not rely on recidivism in selecting the upper term, but that does not change the fact that defendant's recidivism *exposed* him to the upper term, consistent with the Sixth Amendment. (See *People v. Stuart* (2008) 159 Cal.App.4th 312, 314.)

DISPOSITION⁵

The judgment is affirmed as modified. The trial court is directed to prepare and forward to the Department of Corrections and Rehabilitation a new abstract of judgment.

CANTIL-SAKAUYE, J.

We concur:

BLEASE, Acting P. J.

HULL, J.

⁵ The jury finding that defendant personally used a firearm makes his assault conviction a "violent" felony. (§ 667.5, subd. (c)(8).) Therefore, he is subject to a 15-percent limitation on presentence conduct credits and he is not entitled to the benefit of the more favorable conduct credit formulae recently enacted. (§ 2933.1, subd. (c).)

We also note that the existing abstract misstates the total time imposed as 20 years, instead of 29 years. The trial court has a duty to ensure that the abstract accurately reflects all aspects of the sentence imposed in open court. (*People v. Zackery* (2007) 147 Cal.App.4th 380, 385-389; see *People v. Mitchell* (2001) 26 Cal.4th 181, 185.) The trial court must ensure that the new abstract is accurate.